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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RODRIGO IGNACIO,

Defendant and Appellant.

B282553

(Los Angeles County  
Super. Ct. No. BA450671)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael Abzug, Judge. Affirmed in part and remanded with directions.

Robert S. Gerstein, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

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Rodrigo Ignacio appeals the judgment entered following a jury trial in which he was convicted of attempted second degree robbery (count 1; Pen. Code,<sup>1</sup> § 664/211), resisting an executive officer (count 3; § 69), and battery upon a peace officer (count 4 ; § 243, subd. (b)). Appellant admitted, and the court found true, a 2014 conviction for robbery, which was alleged as a prior serious felony conviction under section 667, subdivision (a)(1), and a prior serious and/or violent felony conviction under the Three Strikes law (§§ 667, subd. (b)–(j), 1170.12). The trial court granted appellant’s *Romero*<sup>2</sup> motion, and imposed an aggregate sentence of 7 years in state prison, consisting of the low term of 16 months on count 1, plus 5 years pursuant to section 667, subdivision (a)(1), and one-third the mid term of 24 months for an additional 8 months on count 4.

Appellant contends: (1) the prosecution’s failure timely to provide the defense with the body camera video of appellant’s arrest in violation of section 1054.1 compels reversal; and (2) the trial court erred in denying appellant’s motion for a new trial. We disagree and affirm the judgment of conviction. However, in light of the recent passage and approval by the Governor of Senate Bill No. 1393,<sup>3</sup> we remand the matter to the trial court to exercise its new discretion to impose or strike the serious felony enhancement under section 667, subdivision (a)(1).

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

<sup>2</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

<sup>3</sup> Stats. 2018, ch. 1013, § 2.

## **FACTUAL BACKGROUND**

Just before midnight on October 1, 2016, Javan Butler was walking to his apartment at 5th and Spring Streets when appellant ran up to him and demanded money. Appellant started feeling Butler's pockets and tried to reach into the pocket where Butler had his wallet. Butler pushed appellant away. Appellant staggered back, then charged Butler and punched him twice in the jaw. Appellant looked "extremely crazy," repeatedly demanding money as the men struggled and Butler tried to get away.

A police car pulled up and an officer told them to stop fighting. Appellant took off running into an apartment building. Butler identified himself to the police and related what had happened. Moments later two security guards brought appellant out of the building and handed him over to the police.

Appellant struggled violently during his arrest. When one of the officers told appellant he was going to jail, appellant spat in his face. As the officers put him on the ground, appellant was shouting profanities. Even after the officers had put a spit sock over appellant's head, he managed to spit on the officer again, spraying the officer's face through the sock.

Appellant was treated at the scene and taken to the hospital due to "extreme intoxication" and complaints that he could not breathe.

## DISCUSSION

### **I. The Prosecution's Failure to Turn Over the Body Camera Video of Appellant's Arrest at Least 30 Days Before Trial in Violation of Section 1054.1**

#### ***A. Relevant proceedings***

Prior to the start of trial, the prosecutor informed the court she did not intend to play any audio or video recordings to the jury. When the subject of the police body camera video came up during trial, the prosecutor indicated she was "trying to find out if [any video] exists." The next day the prosecutor announced that the body camera footage had been received that morning. Defense counsel moved to exclude the video and any mention of its contents. The prosecutor agreed not to ask about the contents of the video in her direct examination.

In cross-examining the officer, defense counsel challenged the officer's assessment that, despite being obviously intoxicated, appellant was nevertheless able to understand and comply with commands, and he seemed to know where he was and what he was doing. Counsel also confronted the officer about his testimony that appellant was put on the ground to control him and prevent him from spitting or harming the officers, and that the ambulance was called because appellant had complained he could not breathe. Instead, counsel repeatedly suggested that it was appellant's extreme intoxication that forced the officers to put him down on the ground, call a rescue ambulance to transport him to the hospital, and forgo reading him his rights and questioning him.

After the arresting officer had testified, the People requested permission to play the body camera video because the

officer's credibility had been challenged regarding appellant's level of intoxication. Defense counsel objected that the video was late discovery, and she had not even seen it. The court sustained the objection, declaring, "We're not going to be able to use the tape. It's late discovery. It prejudices the defense. It prejudices the orderly processes of justice."

The defense then sought to present expert testimony to support the defense theory that appellant was too intoxicated to form the requisite criminal intent. The prosecutor objected to the expert based on late discovery and requested that if the expert did testify, the prosecution be allowed to counter the testimony with the video footage. The trial court deferred ruling on the video's admissibility until defense counsel had an opportunity to view it.

The court recessed early for the day to give defense counsel time to review the 40-minute video, but defense counsel asked for more time. The court responded that counsel was getting "a lot of time" to review the video, and if she used that time efficiently, she might not need a continuance. The court added, "If you still feel you need a continuance, I'll hear you, of course, but you need to explain very clearly why the time that I've given you is insufficient, and I'll rule." Counsel replied, "Okay."

The next day, defense counsel did not ask for a continuance, but renewed her objection to the introduction of the video, arguing that it was not proper impeachment and there had been no time to translate the portions of the video that were in Spanish into English. The prosecutor countered that the video should be admitted to contradict the defense expert's anticipated testimony that appellant "was pretty much out of his mind, that he could not form any thought, he couldn't form any movement."

The trial court ruled the video admissible on rebuttal. It discounted the claim of surprise based on the tactical decision by the defense not to compel production of the video. The court also noted it had granted the defense request for an early adjournment to enable counsel to view the video, discuss it with her client, and go over it with the expert. But the dispositive factor in overruling the defense objection was that the video would not be introduced in the People's case-in-chief, but only to rebut the testimony of the defense expert, whose report had been turned over to the prosecution after the start of trial. The court reasoned, "The law does not require [the People], if they have proof showing inferentially [defendant] was in his right mind, . . . to sit on their hands and do nothing." The court added that no matter how the intoxication defense was presented—through expert testimony, medical records, or the observations of another officer at the scene—fairness dictated that the People have an opportunity rebut that evidence with the video.

Defense counsel then declared she would not call the expert or any other witness on the issue of appellant's intoxication if the video was going to come in. She explained, "to be clear the reason I'm not calling the expert if the video comes in is because I feel like my integrity with the jury will be totally undermined."

***B. The trial court properly exercised its discretion in crafting an appropriate remedy for the state law discovery violation.***

Appellant contends the prosecution's violation of section 1054.1 in failing to turn over to the defense the body camera video at least 30 days before trial requires reversal under *People v. Watson* (1956) 46 Cal.2d 818, 836. Based on the same discovery violation and prejudice analysis, appellant maintains that the trial court abused its discretion in denying his motion for

a new trial.<sup>4</sup> (See *People v. Homick* (2012) 55 Cal.4th 816, 894 [“ ‘On appeal, a trial court’s ruling on a motion for new trial is reviewed under a deferential abuse of discretion standard’ ”].) Both contentions lack merit.

Section 1054.1 requires that the prosecution disclose to the defense “[a]ll relevant real evidence seized or obtained as a part of the investigation of the offenses charged” and “[a]ny exculpatory evidence.” (§ 1054.1, subds. (c), (e).) Pursuant to section 1054.7, “ ‘[a]bsent good cause, such evidence must be disclosed at least 30 days before trial, or immediately if discovered or obtained within 30 days of trial.’ ” (*People v. Verdugo* (2010) 50 Cal.4th 263, 280.)

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<sup>4</sup> Because the instant claim rests entirely on state law, the standard of materiality discussed in the two cases cited by appellant—*In re Steele* (2004) 32 Cal.4th 682, 698, and *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 896—is not relevant to the discovery violation at issue here. Both of these cases concern the prosecution’s constitutional obligation to turn over exculpatory evidence to the defense under *Brady v. Maryland* (1963) 373 U.S. 83, 87. However, as defense counsel conceded in seeking to exclude the video altogether, the evidence was plainly not exculpatory, but “confirm[ed] and corroborate[d]” the prosecution witnesses’ testimony, undermining the defense theory that appellant was too intoxicated to form the requisite intent. Accordingly, this appeal does not implicate appellant’s constitutional rights under *Brady*. Rather, the sole issue before us is whether the trial court’s ruling constituted an abuse of its discretion under California law governing discovery. (§ 1054 et seq.; *People v. Ayala* (2000) 23 Cal.4th 225, 299 [trial court’s ruling on prosecution’s discovery violation is reviewed for abuse of discretion].)

A trial court has broad discretion in determining whether a party has violated the discovery statutes and whether to impose sanctions for any such violation. (*People v. Ayala*, *supra*, 23 Cal.4th at p. 299; see *People v. Curl* (2009) 46 Cal.4th 339, 357.) Upon a showing that a party has not complied with its discovery obligations under section 1054.1, section 1054.5 authorizes the trial court to make any order necessary to enforce the provisions of the statute, “including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure.” (§ 1054.5, subd. (b); *People v. Verdugo*, *supra*, 50 Cal.4th at p. 280; *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1313.) “However, the exclusion of testimony is not an appropriate remedy absent a showing of significant prejudice and willful conduct motivated by a desire to obtain a tactical advantage at trial” (*People v. Jordan* (2003) 108 Cal.App.4th 349, 358), and then “only if all other sanctions have been exhausted.” (§ 1054.5, subd. (c).)

Here, there was no showing of misconduct by the prosecutor, nor were all other sanctions exhausted before the trial court imposed the most extreme sanction available—exclusion of the evidence—for the prosecution’s late discovery. Appellant nevertheless asserts that the trial court abused its discretion by refusing to exclude the video during the prosecution’s rebuttal if appellant presented evidence to support an intoxication defense.

In support of his argument, appellant falsely claims that the trial court denied his request for a continuance beyond the following morning in order for counsel to complete a thorough review of the video, which would have included showing it to her



expert witness and having the Spanish translated into English. As a result of having insufficient time to prepare, appellant claims he was forced to abandon his intoxication defense. However, appellant never requested a continuance, despite the court's express assurance that it would "entertain a further motion for [a] continuance" if the time given proved insufficient. Moreover, although the court specifically ordered the expert to remain available to view and discuss the video with defense counsel during the adjournment, defense counsel did not show the video to the expert and offered no explanation for her failure to do so.

Of course, "[i]t is defendant's burden to show that the failure to timely comply with any discovery order is prejudicial, and that a continuance would not have cured the harm.'" (*People v. McKinnon* (2011) 52 Cal.4th 610, 668; *People v. Jenkins* (2000) 22 Cal.4th 900, 950.) Appellant has failed to meet his burden. He sought no continuance, and he makes no showing that a continuance would not have cured the harm he alleges. Indeed, although appellant asserts he would have reviewed the video with his expert had he received it in a timely manner, he fails to explain why he did not show the video to the expert in the time he was given, despite the court's order. His claim that translating the video from Spanish into English would have helped his defense is not only speculative, but he neglects to show that he could not have obtained a translation if he had asked for and received more time to do so. Finally, appellant claims he was prevented from cross-examining the prosecution witnesses about the contents of the video. But the court's ruling allowing the prosecution to use the video to rebut an intoxication defense had no bearing on appellant's ability to cross-examine prosecution

witnesses since it was he who successfully sought to exclude the video from the prosecution's case.

Significantly, appellant cites no authority for the proposition that the trial court erred in refusing to allow his intoxication defense to go unrebutted. Indeed, had appellant presented evidence that he was too intoxicated to form the requisite intent (see *People v. Williams* (1997) 16 Cal.4th 635, 677), fundamental fairness would have dictated that the prosecution be allowed to present evidence to counter that defense. (See *People v. Thompson* (2016) 1 Cal.5th 1043, 1116.) As our Supreme Court has observed, “[a]lthough our system of administering criminal justice is adversary in nature, a trial is not a game. Its ultimate goal is the ascertainment of truth.” (*In re Michael L.* (1985) 39 Cal.3d 81, 93; *People v. Hicks* (2017) 4 Cal.5th 203, 210 [“ “[o]ur courts are not gambling halls but forums for the discovery of truth” ’ ”].) Because “exclusion of evidence necessarily may affect the factfinding process . . . , ‘ . . . the potential prejudice to the truth-determining function of the trial process must also weigh in the balance ’ ” when the trial court is considering the appropriate remedy for a discovery violation by the prosecution. (*People v. Gonzales* (1994) 22 Cal.App.4th 1744, 1757.)

Here, the trial court's exclusion of the video in the prosecution's case-in-chief while allowing it for rebuttal balanced the parties' interests and issues of fundamental fairness while preserving the truth-finding function of the trial process. The video was not played to the jury, and appellant has not shown how a further continuance would have been an inadequate remedy had he asked for one. In short, we find neither an abuse of discretion by the trial court nor any prejudice to appellant from the court's ruling. For this reason we also reject appellant's

contention that the trial court abused its discretion in denying the motion for a new trial based on the prosecution's discovery violation.

**II. The Trial Court Has Discretion to Reconsider  
Imposition of the Five-Year Enhancement  
Under Section 667, subdivision (a)(1)**

On September 30, 2018, the Governor signed Senate Bill No. 1393, which amends sections 1385 and 667 to give trial courts discretion to strike the five-year enhancement under section 667, subdivision (a)(1). The law becomes effective on January 1, 2019. After that date, the legislation will apply retroactively to cases in which judgment is not yet final on appeal. (See *People v. Brown* (2012) 54 Cal.4th 314, 323 ["[w]hen the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date"], fn. omitted.)

Prior to Senate Bill No. 1393, section 1385, subdivision (b), expressly prohibited a trial court from striking "any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." (*People v. Valencia* (1989) 207 Cal.App.3d 1042, 1045, fn. 2 [under § 1385, subd. (b), trial court has no discretion to strike § 667, subd. (a) enhancement].) Senate Bill No. 1393 eliminates this restriction.

In the context of Senate Bill No. 620, courts have held that remand is required absent a clear indication that the trial court would *not* have reduced the sentence if it had been aware of its discretion to do so. (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110.) The trial court gave no such indication here. To the contrary, during a discussion of a possible plea agreement after

the prosecution had rested, the trial court stated, “I think based on what I’ve seen, four years is adequate punishment for what [appellant] did.” Accordingly, on remand the trial court may consider whether to exercise its discretion to impose or strike the five-year prior serious felony enhancement under section 667, subdivision (a)(1). Should the court strike the enhancement, it may then reconsider all of the sentencing choices presented and impose a new sentence. (*People v. Hill* (1986) 185 Cal.App.3d 831, 834 [“an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components”]; see *People v. Garner* (2016) 244 Cal.App.4th 1113, 1118.)

### **DISPOSITION**

The matter is remanded with directions that the trial court exercise its discretion to impose or strike the five-year section 667, subdivision (a)(1) prior serious felony enhancement, and, if the enhancement is stricken, to impose a new sentence. The trial court is further ordered to forward the corrected abstract of judgment to the California Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.